Hamel Forest Products, Inc. *and* International Woodworkers of America, AFL-CIO-CLC. Cases 30-CA-6708(E), 30-CA-6778-2(E), and 30-CA-6905(E)

6 June 1984

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 14 September 1983 Administrative Law Judge Frank H. Itkin issued the attached supplemental decision. The Applicant, Hamel Forest Products, Inc., filed exceptions, and the General Counsel filed a brief in opposition to the exceptions and in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached supplemental decision in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the application is denied.

SUPPLEMENTAL DECISION

Equal Access to Justice Act

FRANK H. ITKIN, Administrative Law Judge. On June 16, 1983, the administrative law judge's decision issued in the above-consolidated unfair labor practice proceeding. On July 20, 1983, the Board, noting that no statement of exceptions having been filed and the time for filing such exceptions having expired, entered its Order adopting the findings and conclusions of the administrative law judge, and therefore directed Respondent Employer to comply with the Order of the administrative law judge. In the meantime, on July 15, 1983, Respondent Employer filed with the Board an application for award of attorneys fees pursuant to the Equal Access to Justice Act, Pub. L. 96-481, 94 Stat. 2325, and Section 102.143 of the Board's Rules and Regulations. On July 22, 1983, the Board referred this application to the administrative law judge for appropriate action. Thereafter, on August 4, 1983, the General Counsel filed a motion to dismiss Respondent's application. And on August 18, 1983, Respondent filed a response to motion to dismiss. For the reasons stated below, Respondent's application is denied.

The General Counsel alleged and argued in the initial unfair labor practice proceeding that Respondent Employer had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act by engaging in surveillance of a union meeting about September 1, 1981; by discriminatorily denying an employee's request for a day off because of his union activities about September 3 or 4, 1981; by unilaterally implementing and thereafter enforcing and maintaining certain work rules during mid-September 1981; by promulgating and thereafter maintaining and enforcing an overly broad no-solicitation rule during mid-September 1981; by refusing to supply the Union with information regarding its survey of other employers and the number of paid holidays granted to their employees about October 6, 1981; by discriminatorily suspending employee Edmund Suchomski for 3 days about October 20, 1981; by threatening to retaliate against employee Suchomski and the Union's representative about December 9, 1981; and by discriminatorily discharging employee Suchomski about January 4, 1982. Following some 4 days of hearing, the administrative law judge, and the Board, found that Respondent Employer had violated Section 8(a)(1) of the Act by engaging in surveillance and creating the impression of engaging in surveillance of employee union activities and by threatening to retaliate against an employee and union representative; Section 8(a)(1) and (3) of the Act by discriminatorily denying an employee a day off because of his suspected union activities; and Section 8(a)(5) and (1) of the Act by refusing to supply the Union, the certified bargaining agent of an appropriate unit of its employees, with information regarding a survey of other employers and the number of paid holidays granted to their employees. The remaining allegations and contentions were dismissed.

Respondent Employer, in its application for award for fees, argues that it "has prevailed in respect to the adjudication of those portions of the case . . . [pertaining to the] suspension of Suchomski and termination of Suchomski" the "overwhelming majority of the proceeding was directed to those portions of the case" the "positions of the General Counsel in the foregoing proceeding . . . were not substantially justified" the "evidence available to the General Counsel prior to the issuance of the complaint clearly indicated that Edmund Suchomski's conduct justified his termination irrespective of any anti-Union animus"; and the General Counsel "proceeded apparently in reliance on witness Bach whose testimony the Administrative Law Judge" found to be "totally unreliable, untrustworthy and incredible."[1]

[1] As recited in the initial decision:

> During the General Counsel's investigation of this proceeding, counsel for Respondent mailed to counsel for General Counsel a copy of the tachometer chart in use during Suchomski's shift on January 4. See G.C. Exhs. 7(a), 7(b) and 7(c). Also see R. Exh. 7. Thereafter, David Bach, formerly manager or assistant manager for Respondent, gave counsel for General Counsel an affidavit, asserting therein, *inter alia*, that on January 5, 1982, Flora had instructed Bach to "go through old kiln temperature charts" and "to find one . . . that . . . would coincide with the time Ed was watching TV . . . this would help substantiate the firing . . . ." Bach further stated in his affidavit:
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> I did what Flora told me. I found a . . . chart; changed the date; and put Ed's name on it . . . . I attach hereto and make a part hereof the chart I found . . . Exh. A . . . .
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> See R. Exh. 6 and Exh. A annexed. Cf. G.C. Exhs. 7(a), 7(b) and 7(c) and R. Exh. 7.

Continued

The administrative law judge, and the Board, explained the pertinent findings in the initial unfair labor practice case, in part as follows:

> The credited evidence of record, as found *supra*, makes it clear that Company supervisor Bach, the Employer's plant manager and later assistant plant manager, violated Section 8(a)(1) when he pointedly asked employee Gralla in the office "if it would be allright if [Bach] attended the Union meeting that night." Bach was later observed in the area where the meeting was being held. Bach "slowly . . . took a step and stopped, took a step and stopped [and] took a step and stopped . . . [and] looked at us by the picnic table" while the meeting was in progress. Indeed, as counsel for the Employer acknowledged, Bach told one of the employees, "who asked why they were there . . ." that he, Bach, was "spying on the Union." Although Bach was assertedly "joking," I find on this record that such conduct and statements clearly tended to impinge on employee Section 7 rights. Bach, in short, was creating the impression of spying on a Union meeting and, in fact, was spying on the Union meeting, in violation of Section 8(a)(1) of the Act.
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> Some three days after the Union meeting which Bach openly observed, on September 4, Bach denied employee Gralla's request for the following Saturday, September 5, off. Gralla wanted the day off to attend a wedding. He appealed Bach's denial to Company president Hamel. Hamel, in also refusing to grant [the] request, made clear to the employee: ". . . you're the instigator, the leader of the Union . . . you should have thought about that before you voted for the Union . . ."— Hamel "thought he knew who [Gralla] voted for." These statements and conduct by the Company president tend to interfere with employees Section 7 activities and, in addition, establish here that Gralla was being discriminated against with respect to his terms and conditions of employment because of his suspected Union activities, in violation of Section 8(a)(1) and (3) of the Act.
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> The credited evidence of record also shows here that when the Union attempted to expand its organizational effort to the Employer's Vesper facility on December 9, Company president Hamel confronted Union representative Burnell at the driveway, where Burnell was attempting to handbill employees, and there made repeated vulgar and obscene statements to Burnell. Hamel threatened Burnell: ". . . I'll get you you fucking communist and I'll get that fucking Suchomski if it's the last thing I do." Hamel subsequently returned to the inside of the Vesper plant and, then, on the intercom or loudspeaker, continued to taunt and harass the Union organizers. I find here that such statements and conduct by Hamel were calculated to deter further Union activities on the part of his Vesper employees; there were Vesper employees in the area who could witness and observe this continuing scenerio; and such statements and conduct tend to interfere with employee Section 7 rights, in violation of Section 8(a)(1) of the Act.
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> There remains the question, whether or not Respondent Employer, by suspending employee Suchomski on October 20 and by subsequently firing him on January 4, violated Section 8(a)(1) and (3) of the Act. I find here that the Employer strongly opposed the Union's representation of its employees. Company president Hamel's statements to employee Gralla and his later statements to Union representative Burnell amply demonstrate this animus. Moreover, this record shows that employee Suchomski was an open and active supporter and advocate of the Union among the nine or ten unit employees involved from the outset of the Union's campaign. Suchomski serves the Union's observer at the August 12 election. Management was clearly aware of Suchomski's Union sympathies and efforts.
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> Consequently, the Employer's actions on October 20 and later on January 4, in suspending and firing Suchomski, must be assessed in the context of this strong anti-Union animus and president Hamel's clear threat: ". . . I'll get that fucking Suchomski if it's the last thing I do." So viewed, I find that the Employer's three-day suspension of Suchomski on October 20 and his firing on January 4 were motivated by an unlawful purpose, that is, Suchomski's known Union activities. However, as discussed below, I also find here that the Employer acted for a lawful and legitimate reason in taking this disciplinary action, that is, Suchomski's inadequate and improper performance of his assigned work duties. In short, I am persuaded here that the Employer would have suspended Suchomski on October 20 and would have fired him on January 4 for legitimate or lawful reasons even in the absence of his protected Union activities.

Bach was called as a witness for the General Counsel at this proceeding. On direct examination, he again asserted that he had been instructed by Flora to find an old "chart" with "dips." Bach identified G.C. Exh. 7(b) as the "graph that I changed . . . ." Bach insisted that G.C. Exh. 7(b) was the bogus or fabricated chart. Later, however, during extensive cross-examination, Bach acknowledged that "right now I'm not really sure" whether or not G.C. Exh. 7(b) is or is not the "true chart" for January 4. Elsewhere, he acknowledged that the so-called fabricated chart was in fact the "actual graph." Further, Bach acknowledged giving false testimony before the State unemployment compensation agency with respect to this matter. And, Bach claimed that he had been fired improperly by Flora during May 1982. Under the circumstances, I find Bach to be an unreliable witness and do not rely upon any of his testimony.

Discussion

The Board, in *Enerhaul, Inc.*, 263 NLRB 890, 890 (1983), reversed 710 F.2d 748 (11th Cir. 1983), explained that:

> EAJA provides that an administrative agency shall award to a prevailing party certain expenses incurred in connection with an adversary adjudication, unless the agency finds that the position of the

government was "substantially justified." The legislative history of EAJA characterized "substantially justified" as a test of reasonableness, and further clarified that, "[w]here the Government can show that its case had a reasonable basis both in law and fact, no award will be made."

Based on our review of this case, we conclude that the position of the General Counsel was reasonable in law and fact. In particular, we note the Administrative Law Judge's finding in his original Decision that the General Counsel established a *prima facie* violation of the Act—a finding to which no party excepted. We therefore agree with the Administrative Law Judge's finding that the General Counsel's position was substantially justified within the meaning of EAJA. Consequently, the Applicant's application shall be dismissed.

The Board further noted that (at fn. 3):

> We do not, however, suggest that a finding that the General Counsel established a *prima facie* case is a prerequisite to finding the General Counsel's position reasonable in law and fact. We shall continue to analyze EAJA applications on a case-by-case basis.[2]

Later, in *Jim's Big M*, 266 NLRB 665 fn. 1 (1983), the Board explained that:

> [T]he presence or absence of a *prima facie* case is not determinative of whether or not an applicant is entitled to an EAJA award. Rather, the legislative history of EAJA states that the standard "is essentially one of reasonableness" and is not to be equated with "a substantial probability of prevailing." S. Rep. F96-253 [96th Cong., 1st sess.] at 6-7 (1979); H.R. Rep. 96-1418 [96th Cong., 2d sess.] at 10-11 (1980). Further, we have held that all EAJA applications shall be analyzed on a case-by-case basis. *Enerhaul, Inc.*, 263 NLRB 890 fn. 3 (1982). As discussed by the Administrative Law Judge, the Board found that the evidence in the underlying case failed to establish a *prima facie* case based, in large part, on the absence of credited evidence of union animus by the Applicants. The Administrative Law Judge further pointed out, however, that if credited Anthony Pento's testimony relating to statements made by representatives of Applicant Big M that the new store would not be operated on a union basis would have been sufficient evidence of union animus to support a *prima facie* case. In these circumstances, we find that the position taken by the General Counsel was reasonable.

Also see *Spencer v. NLRB*, 712 F.2d 539 (D.C. Cir. 1983); and *Wyandotte Savings Bank v. NLRB*, 110 LRRM 2929 (6th Cir. 1982).

Under all the circumstances, I find and conclude here that the General Counsel's position with respect to the disciplinary actions taken against employee Suchomski was "substantially justified." The General Counsel has shown that "its case had a reasonable basis both in law and in fact . . ." (Ibid.) Indeed, the administrative law judge, and the Board, found here, in effect, that the General Counsel had established a prima facie violation of the Act with respect to employee Suchomski. In sum, the General Counsel's position in this respect was substantially justified within the meaning of EAJA, and therefore this application is denied.

ORDER

It is ordered that the application of Hamel Forest Products, Inc., for an award under the Equal Access to Justice Act is denied.[3]

[2] The court, in reversing the Board in *Enerhaul*, noted, inter alia, that "Because the NLRB's position in this case was unreasonable under the law of this Circuit, we hold that the ALJ and the Board abused their discretion by dismissing" the application. The instant case is plainly distinguishable in this respect.

[3] Applicant's motion that its net worth data be kept confidential under Sec. 102.147(g)(1) of the Board's Rules and Regulations is granted. This data, annexed to the application, should be withheld from disclosure.